The only case which the court cited as immediate authority for this novel principle is its own earlier decision on Old Colony's claim,[21] subsequently reversed. The court awarded the claimant, on this theory, damages representative of rent less rental value for a term of 11 years, 3 past at the time of trial and 8 then in the future.

The promulgation of this new rule was quite clearly an effort to justify some award for an apparent loss where proof of the amount is not easy. But the court proceeded to place a value on a property interest entirely different from the unexpired term of 969 years which should have been valued. Furthermore, it dealt with the question as one of damage accruing year by year, involving the problem of computing yearly sums and adding them, and it was balked by the vain task of calculating the annual amounts for more than a few years. Of course it is impossible to forecast accurately how much the worth of a transportation property, or a property of any sort, might fall below a specified rental at any particular date in the future, whether it be 5 years ahead or 50; but that is hardly the point in issue. The question is one of present damage, and it depends on the "present rental value of the remainder of the term," not on the future rental values of all the future years. The actual damage of the landlord is suffered all at once: he loses, at the moment of rejection, the whole value to him of a certain definite term for years—the residue of the original lease, and that is susceptible of legal valuation no matter how extended it may be.

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[21] *In re New York, New Haven and Hartford R.R.*, 98 F. (2d) 670 (C.C.A. 2). The opinion in that case contained an intimation that a similar rule might have been adopted had the court not been bound by its original ruling on Connecticut Railway and Lighting Company's claim (*Connecticut Railway and Lighting Company* v. *Palmer*, 95 F. (2d) 483). The decision was reversed in *Palmer* v. *Palmer*, 305 U.S. 578.

In valuing the landlord's interest in a term the future must be weighed, all relevant circumstances, both past and present, considered, and expert opinion usually consulted, but the result is a determination of the reasonable value to the lessor of the whole remaining term, the amount by which the rent reserved exceeds the rental value—not a series of annual assessments [22] of possible damage running forward to a point where a party, or a court, yields to the impossibility of making a safe prediction.

The difficulties of appraising a long term, described in this Court's earlier opinion,[23] should not be minimized. At best the matte[illegible]ne requiring care and caution in high degree, and ordi[illegible]y extensive research; in some circumstances it may not be possible for the claimant, having the burden of proof, to establish the fact of loss. The problem, however, is not one of how far into the future one may with any assurance project a definite estimate of earnings. It is the familiar problem of determining fair value, at a given date, in view of all the circumstances existing at that time and the probabilities as to the future. It is essentially the same problem as is inherent in the determination of the value of real estate, of a business or of many other kinds of property.

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[22] The Circuit Court of Appeals has taken essentially the same point of view as that urged upon this Court, without success, by the petitioner in the *Perry* case (293 U.S. 307). The petitioner there argued, in its brief (at p. 38), that the calculation of damages would necessarily involve an "inquiry as to the value for each of the monthly rent days for the twelve years to come" which, it was contended, would be hopelessly conjectural. This Court did not notice this argument in its opinion approving the claim computed on the usual basis, "the difference between the present fair value of the remaining rent due under the lease and the present fair rental value of the premises for the balance of the term." (293 U.S. at p. 311.)

[23] 305 U.S. 493, at pp. 504-505.

It is difficult to see how the rule of the Circuit Court of Appeals can be reconciled with the controlling decision of this Court, *Connecticut Railway and Lighting Company* v. *Palmer*. The Circuit Court of Appeals has valued, not the 969-year residue which was before it, but a curtailed term of 11 years, and has wholly misconceived the problem.

IV. The Proof of Rental Value.

The usual standards for proof of the value of long terms are well stated in *Friend* v. *Commissioner*, 102 F. (2d) 153 (C.C.A. 7), a case in which findings of the value of long unexpired terms made upon "voluminous and highly conflicting testimony of expert witnesses" were sustained:

> "The determination of value involves a question of discretion, calling for sound and reasonable judgment, having as its basis due and proper consideration of all relevant facts and circumstances. The uncontradicted opinions of expert witnesses are not conclusive, but the Board may not arbitrarily ignore or discredit their testimony. Their testimony should be weighed in the light of the other facts developed in the case." (P. 156.)

In the case at bar the claimant did not attempt to prove the value as of the date of rejection of the remaining term of the lease. It offered evidence only of earnings of the property for various past periods,[24] without any expert testimony, leaving the selection of a proper criterion to the District Judge, who ruled that this proof was insufficient.

By way of illustration merely as to the kind of proof which a claimant may offer, and which may well be found

[24] Except that evidence was offered of the value of its real and personal property, upon which there was founded an argument that not more than a 6½% return was likely to be permitted by the public regulatory authorities.

by the trial judge to be satisfactory, reference is made to the evidence in Old Colony's case as indicated in the opinion of the District Court (*In re New York, New Haven and Hartford Railroad Company*, 30 F. Supp. 541, at pp. 542-549).

Old Colony was fortunate in having available the entire record of the New Haven reorganization, a substantial portion of which was directly concerned with the main point involved in the claim case, the earnings value of the Old Colony properties in the past and the future. This record was a reservoir of information, of which a large part had been already tested in adversary proceedings.[25]

The very great importance of the early years, in evaluating a long term, is well illustrated in Old Colony's case. The figures reflecting the operations of all Old Colony's lines for the first 4 years of the reorganization, which had been prepared by the New Haven Trustees and consequently were not open to question, showed losses so heavy that annual earnings of a million dollars a year for each remaining year of the term would not have sufficed to cancel them.[26]

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[25] "A wealth of relevant evidence has been presented, much of it obtained from the numerous studies of the O. C. and N. H. properties and territory made by the staff of the N. H. trustees and various independent agencies in connection with N. H.'s reorganization. Because of the availability of these studies, and the intense scrutiny to which O. C. in particular has been subjected during the reorganization proceedings, wherein the economic justification for its continued existence has been brought into question by the large losses it has sustained, it has been possible to present a record of fact of truly extraordinary breadth and detail." (30 F. Supp. at p. 544.)

[26] "In October, 1935, the leased property was faced with the immediate prospect of staggering losses as the experience of the ensuing four years has actually demonstrated. Nothing in the background of local economic trends or in the competitive situation then existed or has since occurred to justify the expectation that initial losses of such dimensions would be offset by corresponding gains within the period of the unexpired term. Indeed, counsel for the

In developing the proof of rental value, there was presented in Old Colony's behalf a comprehensive study of the traffic sources, that is, the territory which the Old Colony serves. This study embraced the history and growth of the territory, the nature of its economic and industrial development, the influences which have stimulated or retarded that development and its prospects for the future in the light of present tendencies and their underlying causes. The traffic on the lines was analyzed in great detail, revenues and expenses were broken down and the possibilities of improving operation explored. Competitive agencies, their relative strength and prospective development, were dealt with by a large amount of expert testimony, particularly as to the character and volume of traffic carried and the means available for highway and water transportation. Abandonments, the rearrangement and consolidation of lines and facilities, substitution of new equipment, future capital needs and the possibilities of affiliation with other railroads were likewise the subjects of detailed inquiry. Evidence was submitted bearing upon a proper rate of discount. All this substantive testimony was summarized and supplemented by expert opinion evidence, including that of an expert who had been given by the court heavy responsibilities in the reorganization and who had the confidence

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claimant has pointed out that the bare operating losses for the O. C. system of $17,000,000 mentioned above as accruing up to December 31, 1939, if augmented by bond and bank interest accrued and unpaid and by other recurrent obligations for which the N. H. was liable under the lease, would increase the aggregate loss to some $23,000,000; that it would require earnings of $4.70 per share ($1,178,647 per annum above fixed charges and expenses) on O. C. stock, beginning January 1, 1940, and continuing for the entire remaining fifty-two years of the term, before the discounted value of these deficits accumulated up to December 31, 1939 would be offset; and that without a reasonable certainty of such earnings, the unexpired term as of October, 1935 was wholly without any positive rental value." (30 F. Supp. at p. 547.)

of all parties to the proceeding. As no substantial contradictory evidence was offered, and no contrary opinion expressed, the court had a clear and comprehensive record on which to found its judgment.

The conclusion of the District Judge was that the remainder of Old Colony's term had no rental value to any lessee.[27]

Where there is obviously some rental value, as in the case at bar, there is greater difficulty in establishing damages under the prescribed measure. The complete absence of rental value, as in the case of Old Colony, facilitates the proof. Yet even where rental value is demonstrable, proof of damages for the loss of a long term should not be unduly difficult. As pointed out previously, the question of the value of such a term arises whenever a long-term lease is negotiated. Problems of value which are commonly dealt with satisfactorily in ordinary business transactions, and to which the courts have found an answer on many occasions, can readily be solved by a court of bankruptcy.

The disposition of Connecticut Railway and Lighting Company's claim is not within the scope of this brief, nor is it intended to express any opinion as to the sufficiency of the claimant's proof. It is, however, urged that the decision of this Court should not be rested on the grounds stated by the court below. It is submitted that any decision should recognize as the true rule of damages that which awards a lessor the value of the whole unexpired term, not merely of

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[27] ". . . I predicate my decision upon the entire record, which I have attempted to weigh even though space precludes its extended recital. I find, therefore, that on October 23, 1935 the property which was the subject-matter of the lease was wholly without present rental value for the unexpired term and allow this item of claim in the amount of $39,389,161, that being the present value as of October 23, 1935 of the stipulated rental for the remainder of the term computed as above indicated." (30 F. Supp. at p. 549.)

an arbitrarily selected part, and should reaffirm that for the purposes of Section 77 of the Bankruptcy Act the value of a long term may be legally ascertained.

Respectfully submitted,

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